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(Real) concerns, coordination problems and, (im)possible solutions of the mechanism of the controversies in the accords of the EU law

Aristidis Galanis

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Aristidis Galanis, PhD student in European Union Law

Abstract: In recent years some innovations in the sector of economic solutions in the EU agreements have been questionable and certainly a subject of investigation. A comparative, precise work is needed to illustrate and shed light not only on the coordination problems that are under discussion in the sector of the agreements of the EU both from an internal and external point of view but also for the related dispute resolution mechanisms. The contentious practice also shows another very interesting trend that of the conventional practice where the solutions in the preferential agreements and above all of the commercial disputes that are created "come out" of the EU material law and enter in the field of investments in international law.

Keywords: CETA; WTO; NAFTA; ICSID; dispute settlement; preferential agreements of the EU; EU law; international economic law; investor state dispute settlement.

Introduction

When we speak of preferential agreements immediately come to our minds the European trade policy, investments and, promotions on a global level due to innovative models of a conventional nature, as well as European and international economic cooperation. There are many agreements and in the course of negotiation, application and commercial and investment interpretation problems sometimes arise due to the latest crises in the European context. Multilateral and bilateral agreements in the trade and investment sector propose some solutions lato sensu, i.e. an approach that is adopted with respect to the phenomenon of conflicts between dispute resolution mechanisms (Allen, Soave, 2014; Boisson De Chazournes, 2017; Li, Siqing, 2018; Boisson de Chazournes, 2019; Zang, 2019; Strain, 2022).

Despite the continuous jurisdictionalisation and the creation of new tribunals at a global level, the risk of dispute settlement instances, treating the same dispute in parallel and pronouncing themselves in different ways the efficient management of international disputes respecting the legitimacy and credibility of the dispute resolution mechanisms, still remains (Pauwelyn, Salles, 2009; Reinisch, 2010).

The new generation preferential agreements, within the space of the EU, are the main promoter of international economic

relations. The discipline of a global nature does not correspond to a unitary approach that respects dispute resolution mechanisms. Preferential agreements mean a plurality of binding and not mechanisms that can be activated by the contracting parties. Already the agreements themselves delimit the scope of application through a competition of susceptible mechanisms and are part of various contentious mechanisms. The litigation bodies are called upon to play a decisive role through this coordination activity. These are coordination needs with regard to investment disputes and in the event of disputes that concern the same facts and can be superimposed on a preferential solution mechanism. The conventional practice of the Union and the coordination clauses that are intended and activated for similar scenarios are relevant.

The "controversial" relations between commercial, preferential and multilateral matters. What is the external coordination dimension?

When we talk about the external dimension of coordination between related dispute resolution systems, we mean a problematic dimension of conflict and the overlap between interstate and trade dispute proceedings to the multilateral system of related dispute resolution according to the World Trade Organization (WTO). The issue of proceedings according

to the mechanisms that are provided for in regional agreements and within the WTO is very broad and under discussion. According to litigation practice, it is limited and fuels the related debate on the matter. At the same time, regional and multilateral mechanisms become overcrowded due to the absence of suitable conventional coordination tools. These tools are represented by the so-called fork-in-the-road clauses and partially preclude the possibility of initiating the same litigation procedure which relates to the question that corresponds in the substantive discipline in the agreements and in the multilateral and preferential court.

The foreseen clauses include the preferential agreements of EU (Furkulita, 2019). In particular, Art. 29.3 CETA states that:

"1. Recourse to the dispute settlement provisions of this Chapter is without prejudice the possibility of recourse to dispute settlement under the WTO Agreement or any other agreement to which the parties are signatories. 2. In notwithstanding paragraph 1, if a substantially equivalent obligation is established by this Agreement and by the WTO Agreement or any other agreement to which the parties are signatories, a Party may not complain in both fora the violation of this obligation. In such a case, once the dispute settlement procedure provided for by one of the agreements has been initiated, the party shall refrain from alleging the breach of a substantially equivalent obligation under the other agreement, unless the chosen forum fails, for procedural or judicial proceedings reasons other than the conclusion of the work pursuant to Annex 29-A, point 20, to formulate conclusions on this complaint (…)" (Furkulita, 2019; Bungenberg, Reinisch, 2022)[1].

Once the preferential and multilateral forum for the resolution of disputes is chosen, the parties do not resort to another system of

[1]See Art. 15.24 of the trade agreement with Vietnam; and the articles X.3 and X.24 contained in the dispute settlement chapters of the agreements with Mexico, Australia and New Zealand

dispute resolution to report the violation of equivalent obligations. The choice of forum has a foreclosure effect by preventing the overlap of the related conflict between dispute resolution mechanisms and differential systems[2]. A novelty is the examined clause formulating the preferential agreements of the EU which lies in the fact that it reflects a flexible variant of the procedural principle of lis pendens. According to this principle, the exercise of the jurisdiction of a seized body precludes the same case that identifies the basis of the triply identity test: identity of parties, petitum and causa petendi, i.e. pending before another body (Reinisch, 2004; Mclachlan, 2009)[3]. This is a widespread principle in domestic legal systems where applicability on an international level is much discussed (Boisson De Chazournes, 2019). The lis pendens invoked by the international courts is rejected with extreme difficulty due to the strict conditions for its application which it considers integrated

[2]See Art. 14.19 of the South Korea Trade Agreement: "1. Reliance on the dispute settlement provisions of this Chapter is without prejudice to any WTO action, including any dispute settlement action. 2. However, if a party has initiated a dispute settlement proceeding relating to a specific measure, either under this Chapter or under the WTO Agreement, may not initiate proceedings relating to the same measure in the other venue until the first proceeding is completed. is concluded. Furthermore, a party fails to claim in both forums the violation of an obligation under the same terms of this agreement and the WTO agreement. In such a case, after a dispute settlement proceeding has been initiated, the party does not submit a complaint of breach of the same obligation under the other agreement to the other venue, except in the event that the chosen venue fails to comment, for procedural or jurisdictional reasons, on the application relating to the breach of this obligation (...)". See also Art. 222, para. 2 of the Economic Partnership Agreement with the CARIFORUM States, OJ EU 30 October 2008, L 289, 3.

[3]See the Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), in ICJ Reports 2019, p. 402 ss.

into international litigation. Claims are unlikely to be founded on the same legal basis for the parties before two international tribunals.

The use of "substantial equivalence" is one of the obligations envisaged in the agreements that one party considers as violated to define the scope of operation of the fork-in-the-road clauses considered as a general notion that does not apply in circumstances where the obligations of the preferential agreement invoke the relative express reference to obligations that are provided for in the agreements of the WTO by reproducing the relative content (Furculita, 2019) of so-called obligations (Lanyi, Steinbach, 2014). A margin of interpretation goes back to the contentious bodies which are less rigid than the traditional identification of a situation of lis pendens. Thus contributing to and effectively preventing risks according to the phenomenon of parallel proceedings (Boisson De Chazournes, 2019).

Obscure is the issue relating to the effectiveness of the fork-in-the-road clauses. In reality, these are not clauses formulated where the model envisaged in the preferential agreements of the EU pose the problem of the invocability of these clauses to the contentious bodies of the external mechanism. A dispute initiated before the WTO and in relation to the preferential mechanism of the litigation bodies can apply the relative

coordination clause and ascertain the violation of the clause favorable to the seised multilateral forum with regard to the hypothesized scenario. The litigation bodies of the WTO are not competent for the coordination clause which contains the preferential agreement thus ascertaining the violation and declining the jurisdiction of the preferential court adyctum ab initio (Furculita, 2019). The jurisdiction ratione materiae limited to disputes relating to the agreements of the WTO present a possible exercise of an inherent power which leads to the decline before a pending proceeding and according to a preferential agreement.

The organs of the WTO as well as of all the international tribunals are holders of inherent powers where the exercise is functional, thus filling the relative gaps in the procedural legislation as well as safeguarding the relative integrity of the litigation function (Mitchell, Heaton, 2010). Within this framework, jurisdiction is stripped of a pending proceeding before a preferential agreement that meets the structural limits of the WTO system. According to Articles 3.2 and 19.2 of the Agreement on the settlement of disputes, the panels and the Appellate Body “cannot add to or diminish the rights and obligations provided in the covered agreements”. In the event of a declining decision, the jurisdiction according to Art. 23 of the Understanding establishes the relative principle of exclusivity

within the dispute settlement system of the WTO by sanctioning the obligation and the related right for members to have recourse to the mechanism of the WTO for the settlement of disputes (Madsen, Cebulak, Wiebusch, 2018).

Within this context we recall the Soft Drinks case decided by the Appellate Body which rejected the relative instance of incompetence of the Mexico and proving the assumption where the dispute which is initiated by the United States will have to be resolved within the framework of a system of solution of NAFTA's disputes, stating that a:

"(...) decision by a panel to decline to exercise validly established jurisdiction would seem to "diminish" the right of a complaining Member to "seek the redress of a violation of obligations" within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU. This would not be consistent with a panel's obligations under Articles 3.2 and 19.2 of the DSU. We see no reason, therefore, to disagree with the Panel's statement that a WTO panel "would seem (...) not to be in a position to choose freely whether or not to exercise its jurisdiction (...)[4].

Reading the case well, the appellate body did not exclude that such legal impediments could preclude the relative exercise of the litigation function, reporting that:

"(...) express no view as to whether there may be other circumstances in which legal impediments could exist that would preclude a panel from ruling on the merits of the claims that are before it. In the present case, Mexico argues that the United States' claims under Article III of the GATT 1994 are inextricably linked to a broader dispute, and that only a NAFTA panel could resolve the dispute as a whole. Nevertheless, Mexico does not take issue with the Panel's finding that "neither the subject matter nor the respective positions of the parties are identical in the dispute under the NAFTA (…) and the dispute before us (…) undisputed that no NAFTA panel as yet has decided the "broader dispute" to which Mexico has alluded. Finally, we note

[4]See the report of the Appellate Body: WT/DS308/AB/R: Mexico-Taxes on Soft Drinks, 6 March 2006, par. 53.

that Mexico has expressly stated that the so-called "exclusion clause" of Article 2005.6 of the NAFTA had not been "exercised". We do not express any view on whether a legal impediment to the exercise of a panel's jurisdiction would exist in the event that features such as those mentioned above were present. In any event, we see no legal impediments applicable in this case (…)" (Gàspàr-Szilàgyi, Behn, Langford, 2020).

The appellate body has positioned the possibility of qualifying the circumstances of the legal impediments allowing the declension of jurisdiction.

"(...) The fact that it has taken care to recall these circumstances - diversity of disputes, absence of a decision rendered in the other forum and the failure to activate (or Mexico's failure to choose the exclusive jurisdiction) of the "exclusion clause" (that is, the fork-in-the-road clause) pursuant to Art. 2005.6 of NAFTA[5] -is at least indicative of their potential relevance to this end (...)".

The uncertainty of the modalities, where the violation of a fork-in-the-road clause which is contained in a preferential agreement can be taken into consideration according to the litigation bodies of the WTO, ascertains the legal impediments which are suitable to preclude the exercise of the competence. The clauses in question cannot be directly applied within the scope of the WTO and do not fall within the ratione materiae competence of the litigation bodies. The violation of the activation of the

[5]See Art: 2005.6 NAFTA that affirms: "(…) once dispute settlement procedures have been initiated under Article 2007 or dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the other, unless a Party makes a request pursuant to paragraph 3 or 4". In the new USMCA, which replaces NAFTA, the fork-in-the-road clause is worded this way: "1. If a dispute regarding a matter arises under this Agreement and under another international trade agreement to which the disputing parties are party, including the WTO Agreement, the complaining Party may select the forum in which to settle the dispute. 2. Once a complaining Party has requested the establishment of, or referred a matter to, a panel under this Chapter or a panel or tribunal under an agreement referred to in paragraph 1, the forum selected shall be used to the exclusion of other fora (...)".

mechanism of the WTO after the activation of the preferential and exclusive forum can detect the relative violation of good faith by the complainant member. The activation of a fork-in-the-road clause which contains a preferential agreement is considered in the framework of the WTO a waiver of multilateral jurisdiction after agreement of the relevant parties. The initiation of a proceeding of a contentious nature constitutes a violation of good faith where the members of the WTO respect the recourse and the procedures that are provided for by the Agreement (Furculita, 2019)[6]. The ascertainment of such a violation precludes the continuation of the proceedings before the multilateral forum.

The contentious bodies of the WTO do not pronounce in a decisive manner but indicate the jurisprudence regarding the existence of the relative conditions which recognize a violation of the principle of good faith, thus limiting the right of the members who resort to the contentious procedures of the WTO. The need for renunciation, by initiating multilateral procedures of members, should be "clear and unambiguous"[7] and "reveal clearly that the parties intended to relinquish their rights" (Shaffer, Winters, 2017)[8]. And in this regard it has been

[6]Art. 3, parr. 7 and 10. See also the case: UNCITRAL, Grand River Enterprises Six Nations Ltd v. United States of America (ad hoc), award of 12 January 2011, par. 66.

[7]Report of the panel: WT/DS241/R: Argentina-Poultry Anti-Dumping Duties, 22 April 2003, par. 7.38.

[8]Report of the Appellate Body: WT/DS/27/AB/R: EC-Bananas III (Article 21.5 – Ecuador II/Article 21.5-US), 09 September 2007, para. 217. Report of the Appellate

observed that the fork-in-the-road clauses contained in the preferential agreements of the Union under examination,

> "could be considered good candidates to qualify as relinquishments of the right to initiate procedures under the WTO and, consequently, for solving jurisdictional conflicts" (Furculita, 2019).

In the multilateral context, the valorisation of the arguments that attribute the relative importance, even indirectly, is not envisaged. Clauses that end up avoiding the parallel proceedings and discussions of lis pendens. Multilateral jurisprudence expresses a relative and certain caution by excluding the particular sensitivity towards the nascent problem of parallel proceedings that emerges from the agreements of the Union and the clauses in question are a precise expression that is also used in the multilateral sphere.

Investments and disputes

The EU conventional practice brings some innovative solutions and constitutes a precise reaction to the crisis of legitimacy that the system of dispute settlement and the legal regime of foreign investments goes through (Schill, 2017; Pantaleo, 2019). It is a crisis that highlights the reasons advanced for a further reform in the system where its criticism is based on the perception of inconsistency and unpredictability of the relative arbitral jurisprudence. The parallel procedures feed this type of perception and at the same time explain the approach that is

Body: WT/DS457/AB/R: Peru-Agricultural Products, 20 July 2015, par. 5.25.

adopted by the EU preferential agreements where the objective is to limit it to the maximum possible (Schreuer, 2018; Gaillard, 2019).

Parallel investment proceedings are addressed in classic fork-in-the-road and waiver agreements. Investment arbitration as implemented through bilateral investment treaties (so-called BITs) play an important role for the establishment of coordination tools between international arbitration and bilateral treaty with the procedures activated before the internal courts in the hosting state of the related investment thus simultaneously providing for the choice of domestic or international jurisdiction by the investor which precludes recourse to the other jurisdiction[9]. As far as the waiver clauses are concerned, they have a broad scope and impose a waiver by the investor who resorts to any other dispute settlement mechanism, both national and international, deciding to activate a mechanism that is provided for by the concluded treaty (Schreuer, 2004)[10].

This type of model that we are examining in relation to preferential agreements also includes the mechanism for settling disputes on investments based on some detailed devices which strictly condition the prevention of the phenomenon of parallel proceedings. Within this context we recall Art. 8.22 of the CETA where it states that the:

[9]See Art. 8(2) of BIT between France and Argentina of 1991.
[10]Art. 1121 NAFTA and Art. 14.D.5 USMCA.

"(...) investor may submit an application to the CETA (Court) only if (...) f) withdraws or suspends any pending proceedings before a judicial body initiated pursuant to domestic or international law in relation to a measure which constitutes a violation and which is the subject of his request; and g) waives his right to initiate, before a judicial body governed by domestic or international law, any application or proceeding in relation to a measure constituting an infringement which is the subject of his application (…)" (Bungenberg, Reinisch, 2022)[11].

This is a provision that substantiates the related prerequisite of a procedural nature in relation to the presentation of the appeal before the CETA tribunal. When there is no formal act of renunciation by the investor, the appeal is thus rejected by the relative court.

An important change comes from Art. 8.24 CETA which provides that when a claim is made pursuant to this section and/or another international agreement: a) there is a risk of overlapping of claims; or (b) the other international application could significantly affect the resolution of the application filed under this section. The court, as soon as possible after hearing the disputing parties, stays the proceedings or otherwise arranges for the proceedings initiated under another international agreement to be taken into account in its decision, order or judgment (Bungenberg, Reinisch, 2022). It is an interesting provision that takes into account the limitations of the fork-in-the-road and waiver clauses and respects the prevention of parallel proceedings that are involved in investment arbitration thus turning attention to the role that the court plays rather than

[11]Art. 3.7, par. 1, lit. f) of the investment agreement with Singapore.

that of the parties. It is noted that the effectiveness of these clauses is limited for reasons relating to the relative complexity of the phenomenon in the parallel proceedings of investment arbitration. This type of dispute resolution is easier because it takes advantage of the multiplicity of different parties such as for example shareholders of different nationalities, companies that have different nationalities and that belong to the same group, or from different sources that have as their objective the settlement of the relationship with the hosting state of the investment treaties and/or contracts. It is not enough for the investor to waive the right to resort to another dispute resolution system when the shareholder or company of another nationality is part of the corporate group that legitimately invests in other mechanisms (Pantaleo, 2019).

CETA and EU preferential agreements pose the possibility in the measure that is adopted by one of the contracting parties to be censured by another party that is faced with a dispute settlement mechanism and not by the preferential agreement thus constituting as object of appeal the investor to a court established under the preferential agreement. In other words, these are scenarios that specify that the fork-in-the-road and waiver clauses may not be suitable for preventing the related phenomenon[12].

[12]See Art. 3.34, entitled: "Other claims" that affirms: "1. A claimant shall not submit a claim to the Tribunal if the claimant has a pending claim before any other domestic or international court or tribunal concerning the same measure as that

According to Art. 8.24 CETA parallel investment proceedings include an obligation for the court seised of a preferential settlement to stay proceedings and consider the decision of a parallel proceedings where there is a risk of overlapping or "significant repercussions" in relation to the procedure that initiates the control of a preferential agreement (Bungenberg, Reinisch, 2022).

The obligatory suspension of the proceedings should be discussed as "a draconian measure to be taken" in consideration (Pantaleo, 2019). Surely the obligation exists in evaluative circumstances and left to the discretion of the court. We are talking about a power exercised that recognizes the risk of an accumulation of compensation from other consequences that are negative in parallel proceedings such as conflicting decisions.

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alleged to be inconsistent with the provisions referred to in paragraph 1 of Article 3.27 (scope) and the same loss or damage, unless the claimant withdraws such pending claim. 2. A claimant acting on its own behalf shall not submit a claim to the Tribunal if any person who, directly or indirectly, has an ownership interest in or is controlled by the claimant has a pending claim before the Tribunal or any other domestic or international court or tribunal concerning the same measure as that alleged to be inconsistent with the provisions referred to in paragraph 1 of Article 3.27 (scope) and the same loss or damage, unless that person withdraws such pending claim. 3. A claimant acting on behalf of a locally established company shall not submit a claim to the Tribunal if any person who, directly or indirectly, has an ownership interest in or is controlled by the locally established company has a pending claim before the Tribunal or any other domestic or international court or tribunal concerning the same measure as that alleged to be in breach of the provisions of Chapter 2 (Investment Protection) and the same loss or damage, unless that person withdraws such pending claim. 4. Before submitting a claim, the claimant shall provide: (a) evidence that it and, where relevant pursuant to paragraphs 2 and 3, any person who, directly or indirectly, has an ownership interest in or is controlled by the claimant or the locally established company, has withdrawn any pending claim re- ferred to in paragraphs 1, 2 or 3; and (b) a waiver of its right, and where applicable, of the locally established company's right, to initiate any claim referred to in paragraph 1 (...)".

This solution remits the evaluation associated with the parallel proceedings and the adoption of the related control measures such as the suspension of the proceedings to the same court according to the preferential agreement. The same identification of the parallel procedure is based on criteria of a substantial nature as also referred to by the same requests and are associated with the risks of the accumulation of compensations and the repercussions on the preferential and non-formal procedure such as happens for example in lis pendens which is based on strict criteria of the identities of the parties (Voon and others, 2015; Boisson De Chazournes, 2019). The power to suspend proceedings in the presence of parallel ones is not foreign to the practice of investment arbitration. The ICSID tribunals have considered the related inherent power which is exercised in circumstances which need to safeguard the integrity of the judicial function, compromised by the risks associated with parallel proceedings. The ICSID tribunal in the SPP case stated that:

"(...) the jurisdictions of two unrelated and independent tribunals extend to the same dispute. There is no rule of international law which prevents either tribunal from exercising its jurisdiction (…). The interest of international judicial order, either of the tribunals may, in its discretion and as a matter of comity, decide to stay the exercise of its jurisdiction pending a decision by the other tribunal (...)[13] every court has inherent powers to stay pro- ceedings when justice so requires, and this Tribunal's discretion to do so is established

[13]Southern Pacific Properties (Middle East) Limited v. Arab Republic of Egypt, ICSID Case No. ARB 84/3, Preliminary Decision on Jurisdiction, 27 November 1985, par. 84.

by Article 44 of the (ICSID) Convention (...)"[14].

This is a power recognized with relative caution and exercised in the context of investment arbitration. The provisions of Art. 8.24 CETA appears significant to the extent that it constitutes a sort of codification of inherent power as a benefit of the certainty and legitimacy of the powers of the court (Allen, Soave, 2014; (Bungenberg, Reinisch, 2022)[15]. The effectiveness of this type of rules depends on the sensitivity and discretion of the court which when faced with a situation of multiple proceedings becomes problematic and wants to suspend the exercise of its functions in another proceeding. Such a conventional power constitutes an important step in the reaction of a phenomenon of parallel proceedings that "should be virtually eliminated under EU investment agreements" (Pantaleo, 2019). The practice is continuous and does not provide very significant and innovative indications regarding the agreements of the EU which can serve as a model for other agreements of an international nature on investments and

[14]SGS Société Générale de Surveillance S.A. v. Philippines, ICSID Case No ARB/06/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, par. 173. See Art. 44 of the Convention of the ICSID, that affirms: "(…) if any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question (...)". In the same spiriti see also: ICSID, The Rompetrol Group NV v. Romania, award of 6 May 2013, case no. ARB/06/3, paras 170ss.

[15]"(…) investment tribunals already have this power, as a function of their inherent authority. But their exercise of this power may acquire greater legitimacy if codified in treaty language. Such a clause would also constrain and guide the exercise of this authority, by providing factors for the tribunal to take into account and guidelines on the amount of time a stay would remain in place (...)".

equally in the provisions on commercial matters, inspiring approaches in arbitration jurisprudence and respecting the phenomenon of parallel proceedings.

Typology of internal coordination: relations between trade and other areas

When we speak of an internal dimension of coordination we are referring to the different dispute resolution systems which are provided for in the preferential agreements and which are governed and activated by the dispute itself. This is a susceptible eventuality that presents the parties to the agreement in the context of disputes. We also encounter the same system in the preferential agreements of the EU, as a global approach that regulates the economic aspects in the relations between the parties and not as a unitary approach where the dispute settlement procedures are related to these areas. The system of the CETA is not unitary and perfect, but only general for the settlement of disputes provided for in Chapter 29[16] which provides for autonomous binding or not systematic types for the settlement of disputes (Bronchers, Gruni, 2021)[17].

Within this context, we recall the Ukraine wood export ban case[18], where the relative panel was established according to Art.

[16]Art. 3.7 relating to disputes on trade defense measures.

[17]Algeria trade restrictive measures, Korea labour commitments, Southern African Customs Union poultry safeguards and Ukraine wood export ban.

[18]Restrictions applied by Ukraine on exports of certain wood products to the European Union, Final Report of the Arbitration Panel, 11 December 2020.

307 of the Association Agreement with Ukraine and had to decide on the exception proposed by Ukraine in the role of the respondent state respecting the competence to rule on the appeal of the Union (Polovets, 2021). In practice, Ukraine:

"(...) concerning certain restrictive measures on the export of timber products, was erroneously referred by the European Union to the general dispute mechanism governed by Chapter 14 of the agreement and (...) Chapter 13 (on "Trade and sustainable development")[19], with respect to which the general dispute mechanism of a binding nature does not apply[20], but a dispute settlement system based on consultations between the parties and, in the event of an unsuccessful outcome, on the non-binding recommendations of a group of experts"[21].

EU in addition to contesting, from a procedural point of view, the late nature of the objection raised by Ukraine5[22], also observed that its appeal was expressly based on the violation of Art. 35 of the agreement (included in Title IV relating to "Trade and trade issues"), concerning import and export restrictions. Subject to the dispute settlement system is Chapter 14 which extends the interpretation and application of the provisions of Title IV of the agreement to disputes[23]. The existence of a

[19]According the declaration of Ukraine: "(…) the current dispute definitely relates to the trade in forest products (unprocessed timber; timber and sawn wood from 10 valuable and rare species listed in Article 1 of Law 2860-IV). It is therefore arising under Chapter 13 of the AA and it must be resolved only according to the procedures provided for in Articles 300 and 301 of the Association Agreement (...)". Restrictions applied by Ukraine, Final Report, cit., par. 93.

[20]Art. 300, par. 7: "(…) For any matter arising under this Chapter, the parties shall only have recourse to the procedures provided for in Articles 300 and 301 of this Agreement (...)".

[21]See Art. 301, par. 2 "[t]he Parties shall make their best efforts to accommodate advice or recommendations of the Group on the implementation of this Chapter (…)".

[22]Restrictions applied by Ukraine, Final Report, cit., par. 100.

[23]See Art. 304: "(…) the provisions of this Chapter apply in respect to any dispute concerning the interpretation and application of the provisions of Title IV of this Agreement except as otherwise expressly provided (…)".

relationship between the disputed measure and the discipline contained in Chapter 14 would be sufficient to determine the exclusivity of the dispute settlement system contemplated therein. The provisions of the agreement invoked in support of this claim[24] lead to the establishment of the Arbitration Panel pursuant to Article 306(3) of the (Association Agreement).

The objection proposed by the Ukrainian side and based on procedural grounds was rejected. The relative lateness of the presentation of the exception that has to do with jurisdiction[25] made it a practice for the decision-making panel to linger and adapt the position proposed by the EU itself by stating that:

"(…) decisive factor for determining whether a dispute falls under the alternative mechanism set out in Article 300(7) of the AA envisaged for Chapter 13 disputes is not so much the language used, but the "matter" which is the subject of the dispute as raised and defined by the complaining party. The Arbitration Panel considers that it cannot question the identification of the matter raised by the Complainant, as long as the Respondent has not made a timely objection to that identification (...)"[26].

Thus the panel resolved the problem relating to the competence and the plurality of dispute mechanisms that are competent for the same dispute by recalling a subjective criterion where the qualification of the dispute calls for a criterion of a subjective

[24]According to the EU: "(…) a "matter" to "arise" under Chapter 13 within the meaning of Article 300(7), it is not enough to show that a measure "relates" to "trade in forest products" or the "protection of the environment" (…) a "measure arises" under Chapter 13 where the complaining party brings a "claim" on the basis of a provision included in Chapter 13 with regard to a "measure" within the scope of the same Chapter (...)". Ukraine has declared that: "(...) it has not brought any claims on the basis of any provision included in Chapter 13 so that Article 300(7) of the AA is not relevant in casu (...)". Restrictions applied by Ukraine, Final Report, op. cit., par. 102.

[25]Parr. 107-125.

[26]Par. 132.

nature which has to do with the qualification of the dispute which submits the relative formulation of the claim to the appellant. The even belated exception from the part of the Ukraina is based on quite elaborate arguments given:

"(...) the relationship of between the measures adopted and chapter 13, it seems to us that such an approach should also take into account of objective criteria for qualifying disputes, since such a determination cannot be entirely entrusted to the appellant party (…). This is the approach that appears to be followed by other international courts. Indeed, it is noted by the arbitral tribunal set up pursuant to Annex VII of the United Nations Convention on the Law of the Sea in the Chagos case. "It is for the Tribunal itself while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties' (...) and in the process 'to isolate the real issue in the case and to identify the object of the claim (…)" (Ranganathan, 2017; Liakopoulos, 2020; Liakopoulos, 2021)[27].

The case just mentioned confirms the provision of dispute mechanisms within the framework of the agreement which calls for a coordination activity according to the diversity of disputes between states and its own susceptibility relating to the scope of application of one or the other dispute system. This is an important role of a coordination activity which is translated according to the qualification of the dispute and in the assessment of the competence which is carried out by the

[27]Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom), Award, 18 March 2015, par. 208, cited the case of the ICJ in case: Fisheries Jurisdiction (Spain v. Canada), Judgment, 4 December 1998, in ICJ Reports 1998, p. 432 ss., par. 30 and in Nuclear Tests (New Zealand v. France), Judgment, 20 December 1974, in ICJ Reports 1974, p. 457ss, par. 30. See also: South China Sea Arbitration, Award on Jurisdiction and Admissibility, 29 October 2015, par 150.

dispute body itself and based on approaches that presumably are elaborated with the relative jurisprudence of the dispute bodies.

Investments and internal "two-level distinctions" between appeals

A preferential agreement is envisaged for investments and related appeals that are subject to the same dispute settlement mechanism. It is a scenario in which the related coordination needs of an internal "two levels distinction" between appeals nature that respects the identifying hypothesis of the dispute mechanism and defines in different ways the disputes that present elements in common and a treatment in a unitary way. Here we can speak of consolidation proceedings, as an institution inspired by investment arbitration[28], as well as commercial arbitration[29] and it is also used in the sector of preferential agreements of the Union which anticipate the mechanism for settling disputes between investor and state. A precise model organized by Art. 8.43 CETA which states:

"(…) two or more requests presented separately pursuant to article 8.23 have a question of fact or of law in common and are motivated by the same events or the same circumstances. A party to the dispute or both parties jointly may request the establishment of a separate division of the court in accordance with this article and request that division to issue a congregation order (…)" (Bungenberg, Reinisch, 2022)[30].

[28]NAFTA, art. 1126.

[29]See Art. 10 of the arbitration rules of the International Chamber of Commerce.

[30]See Art. 3.24 of the investment agreement with Singapore and Art. 3.59 of the investment agreement with Vietnam.

This is a procedure that follows a meeting request. There is no agreement between the parties as to the joining of proceedings when a party asks the question of joining and it is decided by a separate division of the court. It ascertains the existence of the conditions that have to do with a commonality of issues of fact or law and/or as a reasoning based on the same events or circumstances where the meeting of the related proceedings best guarantee the fair and efficient handling of the questions and consistency of judgments[31]. The division may order its jurisdiction over all or part of the claims (Bungenberg, Reinisch, 2022).

It is a model activated to decide the dispute body even in the event that there is no consensus from all the parties who are involved in the future and in the widespread practice through common provisions that are expressed and regulate the institution (Vanhonnaeker, 2020). As far as the preferential agreements of the EU are concerned, it is presented as an effective mechanism in the face of the scenario of multiple proceedings that are part of the same dispute mechanism. It is complex to ascertain the degree that is sufficient for the connection between the applications and the assessment of the litigation body where the division that is separated from the court is decisive in the light of the related criteria such as “the fair and efficient handling of applications” and “coherence of

[31]CETA, Art. 8.43, par. 8.

judgments".

The meeting of the regulated procedures that have to do with the preferential agreements of the EU constitute an innovative datum that respects the most widespread practice in the field of investments (Sardinha, 2016) and the conventional legislation. It is also legitimate to think that the operational effectiveness in practice in the settlement of investment disputes governs this type of agreement. The meeting also applies to appeals that are connected to each other and are presented before the same body. As far as investment litigation is concerned, the scenarios are problematic and more frequent given that they are attenuated to appeals that are presented to different courts with respect to the absence of general coordination rules or in the case of multilateral treaties which govern similar hypotheses where the joining of proceedings it cannot be called unilaterally by the courts (Dionysiou, 2021). Preferential agreements also provide other remedies that respect the proceedings even if they are in meeting and are intended to find greater application.

Conclusions

The solutions found, for the preferential agreements of the EU both at the conventional level and in the face of problems in practices of a contentious nature and in the field of trade and investment that have to do with the conflict and the two-level overlapping of the contentious mechanisms, are instruments of coordination within this type of agreement. The external perspective of coordination has to do with the relationship between the preferential and external forums. As far as the internal one is concerned, the coordination of the plurality of mechanisms are contemplated in the preferential agreements as well as in the relative management of the risks that derive from a plurality of similar appeals pending before the same preferential forum. We are talking about coordination tools that are active in different situations and in relation to different trade and investment sectors where the rationale is that of tools that remain the same to avoid two-line proceedings and decision conflicts that respect issues that are in part similar.

This type of coordination tools are effective and in practice the same in quantitative and qualitative terms. A general and interesting element is the prevention of the relative risks associated with parallel proceedings in international dispute resolution systems. It is a disciplinary and detailed trend relating to the necessary powers that prevent the phenomenon of parallel

proceedings. It is an innovative datum that reflects the awareness where the regulation of this phenomenon can be left given that the application by the litigation bodies effectively leads to an uncertain phenomenon in the global legal system. The conventional instruments that include the clauses in the EU preferential agreements include a wide interpretative margin of the contentious bodies that they find to apply. Thus, the fundamental role of the coordination function is confirmed, which is performed by the same body which does not limit the application mechanism of conventional rules but is called to evaluate the conditions for the application of the clauses in individual cases. It is a system consistent with the competition jurisprudence and with other systems, i.e. an efficient tool for the good administration of justice.

The coordination tools of the EU preferential agreements do not solve the problem of parallel proceedings in the international legal system in a general way. A problematic discourse that has its roots in the very nature of dispute resolution systems where the examined practice functions as a catalyst for an evolution of approaches that respect this phenomenon in other systems both on the conventional and on the jurisprudential level.

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